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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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SUPREME COURT, U.S.

No. 590

ROBERT M. WIEMAN, NANCY KENT ~~ZIESBUR~~, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, AND LUELLA NIETZ,

Appellants,

vs.

PAUL W. UPDEGRAFF, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

H. D. (DON) EMERY,
ROBERT J. EMERY,
Counsel for Appellants.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35160

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA,

also *Plaintiffs in Error*

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, LUELLA NIETZ AND ABOULGHASSEM ZIRAK-ZADEH,

Intervenors, Plaintiffs in Error

vs.

PAUL W. UPDEGRAFF,

Defendant in Error

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz,

intervenors, plaintiffs in error in the Supreme Court o Oklahoma, hereinafter called "appellants," submit here with their statement particularly disclosing the basis upo which the Supreme Court has jurisdiction on appeal t review the judgment of the Supreme Court of the State o Oklahoma, entered in this cause.

I

Opinion Below

The decision and opinion of the Supreme Court of the State of Oklahoma is reported in 237 P. (2d) 131. The decision and opinion has not yet been published in the official Oklahoma Reports.

II

Jurisdiction

The judgment of the Supreme Court of Oklahoma was entered October 18, 1951. Appellants' petition for rehearing was timely filed in the Supreme Court of the State of Oklahoma November 1, 1951, and was denied by said court November 6, 1951. A petition for appeal is presented to the Supreme Court of the State of Oklahoma herewith, to wit, on January 18, 1952, and allowed by said court January 18th, 1952, within ninety days after said judgment and decision became final (Sec. 2101, Title 28 United States Code Revised).

III

Basis of Jurisdiction of the Supreme Court of the United States

The final judgment and decision of the Supreme Court of the State of Oklahoma upheld as valid a statute of the

State of Oklahoma which denied accrued compensation to appellants under a valid contract of employment with the Board of Regents of the Oklahoma Agricultural Colleges for services to be performed at Oklahoma Agricultural and Mechanical College, Stillwater, Oklahoma, which contract was in effect at the time the said statute was enacted, and which statute forfeited said contract without judicial trial by reason of each appellant's failure to take and file a certain oath required by said statute.

It appears from the judgment and decision of the Supreme Court of the State of Oklahoma that said statute was drawn in question as repugnant to the Constitution of the United States and that said decision was in favor of its validity.

The Supreme Court of the State of Oklahoma, in upholding said statute, denied the specific and timely contention of appellants that said statute violated the Constitution of the United States in the following particulars:

(a) Article 1, Section 10, prohibiting a state from impairing the obligation of contracts and prohibiting a state from passing a bill of attainder;

(b) The Fourteenth Amendment, providing that no state shall deprive any person of life, liberty or property without due process of law;

(c) Article I, Section 8, delegating to the Congress the exclusive power to raise and support armies and provide and maintain a navy.

The way in which said statute was drawn in question under the Constitution of the United States, and the specific holdings as to its validity, appear below under VI, B.

IV

Statutory Provisions Believed to Sustain Jurisdiction

The statutory provision vesting the Supreme Court of the United States with jurisdiction of this appeal in Section 1257, Title 28 United States Code, Revised, the material parts of which provide:

> "Final judgment or decrees rendered by the highest court of a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

V

The Statute of the State of Oklahoma Validity of Which Is Involved

The statute involved is enrolled House Bill No. 8, 23rd Legislature (Laws 1951, 51 O. S. 1941 (Supp.) 37.1 - 37.8), and is herein set forth verbatim, as follows:

> AN ACT
>
> Enrolled House Bill No. 8—By: SHIBLEY.
>
> An act relating to public officers and public employees: Prescribing an oath or affirmation to be taken by every officer and employee of the state, county, school district, municipality, public agency, public authority, or public district: Providing for the filing of said oath or affirmation: Providing that no fee shall be charged for administering said oath: Prohibiting payment to any public officer or employee who has not

taken said oath; Providing that the taking of a false oath or affirmation shall be a felony and prescribing the penalty therefor: Providing that any public officer or employee who after taking said oath or affirmation advocates or becomes a member of an organization advocating overthrow of the United States by unlawful means shall be guilty of a felony and prescribing the penalties therefor: Repealing 51 O. S. 1941, § 32, as amended by § 1, Chapter 1, Title 51, Session Laws, 1945; and declaring an emergency.

Be it enacted by the people of the State of Oklahoma:

SECTION 1. Every officer and every employee of the State, county, school district, municipality, public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first (30) days of such employment, take and subscribe to the oath or affirmation required by this Act. Persons now holding any such public office or public employment shall take said oath within thirty (30) days from the effective date of this Act; provided, that public officers or public employees who are on authorized leave on the thirtieth (30th) day after the effective date of this Act shall take and subscribe said oath or affirmation within thirty (30) days after returning to work or to the duties of the office held by such person. Any officer or employee of the State, county, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

SECTION 2. The oath or affirmation required by this Act shall be the following:

I, ——— ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that

I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means; that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof, by force or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government

of the United States or of the State of Oklahoma by force or violence or other unlawful means;

(Here put name of office, or, if an employee, insert "An employee of" followed by the complete designation of the employing officer, office, agency, Authority, commission, department or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.

——— ———.

Subscribed and sworn to before me this the — day of ———, 19—.

———— ————,

Notary Public, or Other Officer Authorized to Administer Oaths or Affirmations.

The above provisions shall be cumulative to other requirements made by law.

Section 3. The oath or affirmation required by this Act shall be filed by the officer or employee executing it with the officer, board, authority or commission having control of the office, agency, authority, department, commission, or institution in or for which the person executing the oath or affirmation is employed or appointed or to which said person is elected; and the officer, board, authority or commission having such control shall, in the case of a state office, agency, department, authority, or institution, file same with the Secre-

tary of State, together with the oath or affirmation or oaths or affirmations of the said controlling officer, board, authority, or commission, and in the case of a county, school district, or municipal office, agency, authority, department or institution, such oaths or affirmations shall be filed by the controlling officer, board, agency, authority, of commission with the county clerk. Every such controlling officer, board, agency, authority, or commission shall keep an official record of all such oaths or affirmations received by him or it, and filed with the Secretary of State or County Clerk, as the case may be, as required by this Section.

Section 4. The oath or affirmation may be taken before any officer authorized to administer oaths or affirmations. No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

Section 5. No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this act. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that every officer or employee thereon has taken such oath or affirmation.

Section 6. Every public officer or employee who, in taking and subscribing to the oath or affirmation required by this Act, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

Section 7. Every public officer or employee having taken and subscribed to the oath or affirmation required by this Act, who, while holding such office, or while in the employment of, or service with, the State or any county, city, school district, municipality, public agency, public authority, or public district, advocates or becomes

a member of any party or organization, political or otherwise, that advocates the overthrow of the United States or of the State of Oklahoma by force or violence or other unlawful means, is guilty of a felony and is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

Section 8. Section 32, Title 51, Oklahoma Statutes 1941, as amended by Section 1, Chapter 1, Title 51, Oklahoma Session Laws, 1945, is hereby repealed.

Section 9. If any provision of this Act, or any word, phrase, clause, sentence, or other portion of the oath or affirmation set out in Section 2 of this Act, or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other portions, provisions or applications of this Act, or of said oath or affirmation, which can be given effect without the invalid portion, provision or application, and to this end the provisions of this Act, and of said oath or affirmation are declared to be severable.

Section 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

Passed the House of Representatives the 21st day of March, 1951.

JAMES M. BULLARD,
Speaker of the House of Representatives.

Passed the Senate the 15th day of March, 1951.

JAMES E. BERRY,
President of the Senate.

Approved by the Governor of the State of Oklahoma the 9th day of April, 1951.

JOHNSTON MURRAY,
Governor of the State of Oklahoma.

Office of Secretary of State: Received by the Secretary of State this 10th day of April, 1951, at 8:45 o'clock A. M.

By JOHN D. CONNER.

Correctly Enrolled: William L. Jones, Chairman, Committee on Engrossed and Enrolled Bills.

The only part of the oath (Section 2 of said statute) asserted by appellants to render said statute unconstitutional as to each of them, is the second rhetorical paragraph thereof.

Incidentally, this second rhetorical paragraph is the very part omitted by the Supreme Court of the State of Oklahoma from its judgment and decision upholding the validity of said statute, including the validity of the oath (237 P. 2d 131, 135).

VI

The Nature of the Case, Rulings of the Oklahoma Supreme Court Bringing Case Within Jurisdictional Provisions, and the Manner and Way in Which Federal Questions Were Raised.

A. *The Nature of the Case*

This suit was instituted in the District Court of Oklahoma County, Oklahoma, hereinafter called District Court (R. 7), by defendant in error-appellee, Paul W. Updegraff, who filed his petition as a citizen and taxpayer of the State of Oklahoma, against the Board of Regents of Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, who were also plaintiffs in error in the Supreme Court, of the State of Oklahoma, to enjoin the payment to all teachers, professors and other employees who failed to take and subscribe to the oath required

by said statute within thirty days from April 9, 1951, the effective date of said statute. The said Board of Regents, State Treasurer and State Auditor, who were defendants in the District Court and represented by the Attorney General of the State of Oklahoma, filed an answer, admitting that defendant in error was a proper party to institute the suit, conceded the existence of valid contracts of employment of teachers, professors and other employees, including appellants, in effect during the fiscal year ending June 30, 1951. The appellants, by permission of the District Court (R. 26), filed separate petitions in intervention and, by permission of court (R. 28), filed a consolidated petition alleging that each appellant was serving Oklahoma Agricultural and Mechanical College under a valid contract of employment, extending at least during the fiscal year ending June 30, 1951; that the annual salaries of appellants were: Correll, $6,000.00; Lee, $4,200.00; Wieman, $3,600.00; Baum, $3,600.00; Nietz, $3,000.00; Schmoe, $1,610.00; Zieber, $900.00; that each appellant is ready, able and willing to perform, is now performing, and will continue to perform services under his contract; that each appellant is entitled to receive payment under his contract for said services. By way of cross-action to appellee's petition to enjoin payment to appellants, each appellant adopted the allegations set forth in said consolidated petition in intervention and prayed the judgment of the District Court that a mandatory injunction issue, compelling and requiring said Board of Regents, State Treasurer and State Auditor to do everything necessary to effect payment to each appellant for services performed under his contract of employment in the consolidated petition and cross-action. Each appellant alleged that a denial of the payments due him under said contracts as a result of the application of said statute would violate the constitutional rights of each appellant in several respects, including the respects specifically set forth and specifically adjudi-

cated by the Supreme Court of the State of Oklahoma in the respects hereinafter set forth.

The case was tried upon stipulations entered into in writing between all parties before the trial in the District Court, and entered into orally during the trial in the District Court. The following is the stipulation (R. 86) entered into in writing before the trial in the District Court and introduced as evidence:

> "It is hereby stipulated and agreed by and between the plaintiff, defendants and intervenors in the above cause that the plaintiff is a taxpayer and citizen of the State of Oklahoma; that the teachers and professors referred to in the pleadings herein were employed by the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges prior to April 9, 1951, to teach in the colleges referred to in the pleadings for and during the school year ending on or prior to June 30, 1951; that the other employees referred to in the pleadings were employed by the defendant, Board of Regents, prior to April 9, 1951, to perform services in the colleges referred to in the pleadings for prescribed periods exceeding thirty (30) days, but not necessarily for the entire school year 1950-51; that said employments were made by virtue of recommendations of employment by the Presidents of said colleges to the defendant, Board of Regents, which recommendations were approved or ratified by the Board after the beginning of the fiscal year ending June 30, 1951, after which said teachers, professors and employees entered into the duties of their respective employments, all of which is reflected in the official minutes of the board; that no written contracts of employment were executed by said teachers, professors and employees with said Board of Regents, except as the above procedure may constitute the execution of such contracts; that the procedure above outlined is in accord with the customary and traditional practice of said board in effecting the employment of teachers, professors and employees in said colleges; that funds are now lawfully available to pay the salaries

of said teachers, professors and employees during the fiscal year ending June 30, 1951; that said teachers, professors and employees, including intervenors, have in all things complied with their respective employments and have done all things required by law in the performance thereof as a condition precedent and as a condition subsequent to the right to receive compensation therefor, except that said have not taken the oath set forth in Section 2 of House Bill No. 8 of the Twenty-third Oklahoma Legislature; that said teachers, professors and employees, including intervenors, have heretofore received payment under their respective employments up to and including the month of April, 1951, and are now ready, willing and able to perform, are now performing and will continue to perform services under their respective employments; and that the intervenors, Baum, Correll, Hunt, Schmoe and Nietz hold religious convictions against bearing arms against their fellow men.

It is further stipulated that "Part II, Text of Policy Statement," attached hereto as a part of this stipulation, constitutes the present policy, in so far as it affects Oklahoma Agricultural and Mechanical College only, adopted by the defendant board April 6, 1945, by the procedure reflected upon the official minutes of said board, as follows:

"It was moved by Mr. Stuart, seconded by Mr. Harber that Dr. Bennett's recommendations for adoption of policy statement of the President's committee dated April 10, 1945, consisting of pages 5 to 11, inclusive, be approved, as submitted, with one exception, viz., that salaries of Deans are to be from $4,000.00 to $7,500.00 instead of $4,000.00 to $6,000.00. Approval be subject to all limitations of the budget.

"Motion carried."

It is also stipulated that A. S. J. Shaw is the duly elected, qualified and acting State Treasurer of Oklahoma; that Wilburn C. Cartwright is the duly elected, qualified and acting State Auditor of Oklahoma; that

the compensation of the teachers, professors and employees referred to in the pleadings is largely paid from state funds; that attached to this stipulation is a list of teachers, professors and employees, separately listed as to colleges, of the colleges referred to in the pleadings who had not on or before midnight May 9, 1951, taken and subscribed to the oath as set forth in Section 2 of said House Bill; that included in said list are teachers, professors and employees who are nationals or citizens of other countries and teachers, professors and employees who have religious scruples against bearing arms; and that any of the parties hereto reserve the right to introduce competent evidence at the trial of this cause with this stipulation.

Dated this 17th day of May, 1951.

PAUL W. UPDEGRAFF,
Attorney for Plaintiff.

By ROBERT J. EMERY,
EMERY & EMERY,
DON EMERY,
Attorneys for Intervenors.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
FRED HANSEN,
First Assistant Attorney General;
Attorneys for Defendants.

All parties also stipulated (R. 75) as follows:

"Mr. Emery: * * * May it be admitted by the Attorney General and counsel for the plaintiff, that each of the intervenors do not advocate and do not belong to any organizations that advocate the overthrow of the government of the United States or the State of Oklahoma by force and violence?

Mr. Updegraff: No, I won't say that. I will say that each of them, if here to testify, would so testify.

Mr. Emery: Then, that their testimony as to the facts alleged in their consolidated petition in interven-

tion may be considered as testimony in this case, as to all facts so alleged, without any challenge as to its competency?

Mr. Updegraff: That's right.

Mr. Hanson: That is satisfactory.

Mr. Emery: All right.

The Court: If I understand you gentlemen correctly, there is no contention that any of these parties are Communists?

Mr. Updegraff: No. We don't say that at all.

Mr. Emery: There is no contention as to that.

The Court: And, they have refused to sign this oath because they are unwilling to bear arms in defense of the United States.

Mr. Emery: That is one of the grounds, but there are several other grounds. The issues are much deeper than that.

Mr. Updegraff: I don't stipulate that none of these people are Communists. I stipulate only that if they were put on the witness stand they would so testify, and their testimony to that effect be considered as evidence in this case."

The consolidated petition was offered in evidence at the trial and was by the District Court admitted in evidence (R. 75). The consolidated petition introduced in evidence by agreement of all parties (R. 33, 34, 35, 39, 40, 41) stated, among other things, that:

"Each intervenor is a citizen and subject of the United States of America and of the State of Oklahoma, a resident of Payne County, Oklahoma, and is now serving Oklahoma Agricultural and Mechanical College as follows: Intervenor Wieman is Assistant Professor of Philosophy; Intervenor Ziebur is Research Assistant for Research Foundation; Intervenor Baum is Assistant Professor of Botany; Intervenor Lee is Associate Professor of Chemistry; Intervenor Correll is Professor of Physics and Chairman of Physical Science; Intervenor Schmoo is a Secretary, and Inter-

venor Nietz is Assistant Professor of Music, each under a valid contract of employment with the defendant Board of Regents and with the Oklahoma Agricultural and Mechanical College, for a term commencing at a time prior to the effective date of an Act enrolled as House Bill No. 8, and passed by the 23rd Oklahoma Legislature; that said contract extends, according to its term, at least to the end of the current fiscal year; * * * that funds are lawfully available to meet the salary obligations of each of said contracts; that each intervenor has in all things complied with said contract, and has done all things required by law in the performance thereof, and required by law as a condition precedent and as a condition subsequent to the right to receive compensation thereunder; that said contract does not require intervenor to take any oath of any kind or to do anything mandated by 'the oath' hereinafter referred to, or to refrain from doing anything proscribed by said Oath; that each intervenor has heretofore received payments monthly thereunder up to and including the month of April, 1951; that each intervenor is now ready, able and willing to perform, and is now performing, and will continue to perform services thereunder during the term thereof without interference from the defendant Board of Regents, or from any of its authorized agents; that this intervenor is entitled to have defendant Board of Regents direct its authorized agent, and to have the defendant, A. S. J. Shaw, as State Treasurer of the State of Oklahoma, and to the defendant, Wilburn C. Cartwright, as State Auditor of the State of Oklahoma, to do any and all things lawfully necessary to be done to effect payment thereunder to this intervenor; and to each intervenor;

That each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate, the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence, or unlawful means;

* * * * * * *

And intervenors further allege, and each intervenor alleges, in reference to his contract of employment, independently thereof and as a part and parcel thereof, that, by the uniform custom, policy and practice of the said defendants, Board of Regents of the Oklahoma Agricultural Colleges, and by the implied understanding and agreement between each intervenor and the said defendants it is contemplated that each intervenor will be retained in the service of said defendants and his employment will be renewed from time to time at the expiration of each term thereof so long as there is need of the services rendered by each intervenor at the said Oklahoma Agricultural and Mechanical College, and so long as each intervenor renders efficient and faithful service and demeans himself in a sober, honest and upright manner; that the said Act, and the requirements thereof, if interpreted and applied in accordance with plaintiff's allegations herein, constitutes an unconstitutional interference in respect to each claim of unconstitutionality hereinabove alleged, and constitute an unconstitutional interference with the right of defendant Board of Regents to continue said custom, policy and practice in the exercise of their constitutional authority to govern and manage the said College, and of each intervenor to have the said Board of Regents free to continue said custom, policy and practice and, in pursuance thereof, to continue each intervenor in his present position and employment without regard to considerations other than the proper and efficient functioning of said College as an educational institution and for the accomplishment of the functions for which it was created; that each intervenor is entitled to have the said defendant Board of Regents free to continue said custom, policy and practice and, in the exercise of their legal and constitutional discretion, free to continue and to renew his said employment, without hindrance or control by the said unconstitutional provisions of said statute and without interference by the refusal of said other defendants,

A. S. J. Shaw and Wilburn Cartwright, to perform their official duties in respect to the employment of each intervenor so long as said employment shall be continued by said defendant Board of Regents.

That intervenor has not taken the Oath; that each intervenor, except Ziebur and Wieman, conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God, and is forbidden by divine law, and that in obedience to these principles, and as a matter of religious faith and obligation, each intervenor, except Ziebur and Wieman, cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman; * * *."

The District Court in its judgment made the following findings of fact (R. 237): "The court finds the facts in this case to be as set forth in the stipulations entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction."

All appellants, except Ziebur, took and subscribed to all parts of the oath as set forth in haec verba in the decision and opinion of the Supreme Court of the State of Oklahoma (R. 199-204). The judgment of the District Court was (R. 245):

"It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors."

This judgment is set forth in the third rhetorical paragraph of the opinion of the Supreme Court of Oklahoma, 237 P. 2d 131, 134.

B. Rulings of the Oklahoma Supreme Court Bringing Case Within Jurisdictional Provisions

In deciding what issues were before it, the Supreme Court of the State of Oklahoma in its decision and opinion said: "Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed." (237 P. 2d 131, 135.)

The Supreme Court of the State of Oklahoma entertained and considered specifically the contention of each appellant that the statute impairs the obligation of contract, contrary to Article I, Section 10 of the Constitution of the United States. The court said in part (237 P. 2d 131, 137):

> "The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.
>
> " 'All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract * * * the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public. * * *' "

In passing upon the contention of each appellant that said statute took liberty and property without due process of law, the Supreme Court of the State of Oklahoma said in part (237 P. 2d 131, 137):

> "The statute and the required loyalty oath do not deprive public officials and employees of property or

liberty without due process of law. The intervenors are employees of the state as teachers in a public institution. They have no constitutional right to be so employed. They have no right to so serve the state except upon such terms as the state prescribes. The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. People v. Crane, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D, 550; Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, 207; Ellis v. U. S., 206 U. S. 246, 27 S. Ct. 600, 51 L. Ed. 1047; McAuliffe v. Mayor, etc., City of New Bedford, 155 Mass. 216, 29 N. E. 517."

In passing upon the contention of each of the appellants that entertain religious convictions against bearing arms, and that as to them said statute violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, the Supreme Court of the State of Oklahoma said (237 P. 2d 131, 138):

"It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty is 'that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary' (that is, if by valid law required). The provisions of the Constitution against the enactment of any law prohibiting the free exercise of religion 'embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.' Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 903, 84 L. Ed. 1213. * * * The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I, Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For

interesting reading on the subject see Wooley v. Watkins, 2 Idaho, Hasb., 590, 22 P. 102."

In passing upon whether or not said statute constituted a bill of attainder in violation of Article I, Section 10 of the Constitution of the United States, the Supreme Court of the State of Oklahoma said (237 P. 2d 131, 138):

> "An ex post facto law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an ex post facto law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an ex post facto law."

Finally, the Supreme Court of the State of Oklahoma, in summation, said (237 P. 2d 131, 138, 139):

> "The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act."

C. The Manner and Way in Which Federal Questions Were Raised.

The Federal questions arising under the Constitution of the United States that were actually considered, and decided by the Supreme Court of the State of Oklahoma in upholding the validity of said statute, were raised by appellants in:

(a) Their consolidated petition in intervention (R. 33, 35, 36, 37, 38) and their consolidated cross-action filed in the District Court (R. 43).

(b) Their motion for a new trial (R. 216-224, incl.).

(c) Their petition in error, including assignments of error filed in the Supreme Court of the State of Oklahoma.

(d) Their briefs submitted in the Supreme Court of the State of Oklahoma.

(e) Their petitions for re-hearing filed in the Supreme Court of the State of Oklahoma.

The contention that said statute constituted a bill of Attainder, in violation of Article I, Section 10 of the Constitution of the United States, was raised by appellants only under (c), (d) and (e) above. This issue was submitted also in the briefs of all the parties to the case.

Moreover:

> "Where it appears from the opinion of the State court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." (*Charleston-Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 185-6.) See also *State* v. *Brand*, 303 U. S. 95.

VII

Grounds Upon Which It Is Contended the Federal Questions Involved Are Substantial.

In stating the grounds upon which it is asserted that the federal questions involved are substantial, reference is first made to the specific holdings, set forth above under VI B, by the Supreme Court of the State of Oklahoma in sustaining the validity of said statute under the Constitution of the United States. Reference is also made

to Section 2 as set forth in full under V above. The middle paragraph thereof, as interpreted by the Supreme Court of the State of Oklahoma (237 P. 2d 131, 135, 136), required each appellant to swear that within the last five years he had not been a member of any organization officially determined to be communistic or subversive by the Attorney General of the United States or other authorized agency. Each appellant holding sincere religious convictions, opposed to the bearing of arms against his fellowman, was required to swear that he would take up arms in defense of the United States in time of war or national emergency, if necessary. If this oath were not taken and subscribed to within thirty days after the effective date of the statute, Section 1 thereof provided that he shall forfeit his employment, and Section 5 provided that he should receive no compensation for such failure. Each appellant asserts that the infliction of such punishment for the failure to take such an oath constitutes a violation of his rights under the Constitution of the United States in the following respects:

The refusal of the District Court to grant each intervenor mandatory injunctive relief, requiring payment for services rendered up to the day of Judgment in the District Court, under a valid and subsisting contract in effect prior to the enactment of said statute, and the affirmance of said judgment by the Supreme Court of the State of Oklahoma, resulting in the application of said statute to each intervenor:

(a) Impairs the obligation of contracts, contrary to article I, Section 10 of the Constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts. (*James Hall v. State of Wisconsin*, 102 U. S. 5 (see also Butler vs. Regents of University, 32 Wis. 124, cited in *James Hall v. State of*

Wisconsin); State v. Brand, 303 U. S. 95; *State of Mississippi for use of Robertson* v. *Miller*, et al., 276 U. S. 174; *Triegle* v. *Acme Home-Stead Association*, 297 U. S. 189.)

(b) Constitutes said statute as a bill of attainder, in violation of Article I, Section 10 of the Constitution of the United States, providing that no state shall pass a bill of attainder. (*United States* v. *Lovett*, 328 U. S. 303; *Garner, et al.* v. *Board of Public Works of the City of Los Angeles*, 341 U. S. 716.)

(c) Is a deprivation of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by virtue of the denial of compensation due under a valid and subsisting contract. (*Connally* v. *General Construction Co.*, 269 U. S. 385, and cases cited under (a) above.)

(d) Is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, by requiring each appellant to swear that he will take up arms in defense of the United States in time of war or national emergency, if necessary, when each appellant holds sincere convictions in conflict thereto. (*West Virginia State Board of Education, et al.* v. *Barnette, et al.*, 319 U. S. 624.)

(e) Constitutes an unconstitutional interference with the exercise by the Congress under Article I, Section 8 of the Constitution of the United States, delegating to the Congress the power to raise and support armies and provide and maintain a navy, the Congress by the enactment of the Selective Service Act of 1948 having adopted a complete, comprehensive and fully integrated scheme in the exercise of such powers. (Hines, Secretary of Labor and Industry of Pennsylvania, et al., 312 U. S. 52.)

(f) The Supreme Court of the State of Oklahoma, in the exercise of its judicial powers of interpretation (237

P. 2d 131, 135), gave the oath required by said statute a meaning not anticipated by men of common intelligence, and denied the request of each appellant, asserted in his petition for a re-hearing, to take and subscribe to the oath as interpreted by the Supreme Court of the State of Oklahoma. (*Connally* v. *General Construction Co.*, 269 U. S. 385; *Garner, et al.* v. *Board of Public Works of the City of Los Angeles*, 341 U. S. 716.) (Petition for Rehearing II, 7.)

The interpretations referred to immediately above, as given by the Supreme Court of the State of Oklahoma in its said judgment and decision, are:

(a) By construing that "I am not affiliated directly or indirectly with . . . any foreign political agency, party, organization or government" as meaning any foreign political agency, party, organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization.

(b) By construing the language of the oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

(c) By construing the language of the oath, "That within five (5) years immediately preceding the taking of the oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) The language of the oath, "that I will take up arms in defense of the United States in time of war or national emergency, if necessary," means in respect of the words "if necessary", if by valid law required.

VIII

Cases Sustaining Jurisdiction of the United States Supreme Court.

(A) The appeal, having been perfected within ninety days from the date on which the judgment of the Supreme Court of the State of Oklahoma became final, is timely (Section 2101, Title 28, United States Code, Revised).

(B) Appeal is the proper remedy for review of a decision of a state court of last resort in favor of the validity of a state statute, where such statute is alleged to contravene the Constitution of the United States (Section 1257, Title 28, United States Code, Revised). *Breard* v. *City of Alexandria, La.*, 341 U. S. 622; *Hamilton* v. *Regents of University of Calif.*, 293 U. S. 345; *Winters* v. *People of State of New York*, 333 U. S. 507.

IX

Judgment and Opinion Appended Hereto

Copy of the judgment and decision of the Supreme Court of the State of Oklahoma, filed October 18, 1951, is appended hereto. Additionally, the Order Sheet of the Supreme Court of the State of Oklahoma, dated November 6, 1951, contains the following statement:

"The Clerk is hereby directed to enter the following orders:

25160—Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz, et al., Plaintiffs; Paul W. Updegraff, Board of Regents of Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer, and Wilburn C. Cartwright, State Auditor, of Oklahoma; Defendants. Petition for re-hearing and oral argument denied."

WHEREFORE, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257, Title 28, United States Code, Revised.

Dated: January 18th, 1952.

H. D. (DON) EMERY,
ROBERT J. EMERY,

Attorneys for Appellants, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Lillian Nietz.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed in Supreme Court of Oklahoma, Oct. 18, 1951
Andy Payne, Clerk.

No. 35,160

The Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, *Plaintiffs in Error,*

also

Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Lee Hunt, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz and Aboulhassan Zirakzadek, *Intervenors, Plaintiffs in Error*

v.

Paul W. Updegraf, *Defendant in Error*

Syllabus

1. The authority of the Legislature extends to all rightful subjects of legislation. It is not only the duty of the Legislature but it has the power to protect the general welfare of the People of the State by the exercise of the police power against subversive influences. 51 O. S. 1941 (Supp.), 37.1 to 37.8 constitutes an exercise of the police power by the Legislature. Such acts are valid so long as they are not unreasonable, arbitrary, and capricious and do not violate any of the fundamental constitutional guaranties of the State and Federal Constitutions.

2. Loyalty of public officials and employees of the State is essential to the preservation of the peace and welfare of the people and may be prescribed as a qualification to hold public office or public employment by the State.

3. A loyalty oath required by an act of the Legislature fixing loyalty as a qualification for public officials and employees of the State may be required as a necessary precedent to the right to continue in the service of the state and draw compensation therefor so long as the terms thereof are reasonably referable and cognate to the purposes of the act and do not violate constitutional guaranties.

4. The foregoing act is not a bill of attainder or ex post facto law; nor does the oath required therein violate Article I, Section 10, Constitution of the United States or Article II, Section 15, Constitution of Oklahoma (inhibition against impairment of contract); the Fourteenth Amendment to the Constitution of the United States or Article II, Section 7 of the Constitution of Oklahoma (due process clause); the First Amendment to the Constitution of the United States or Article I, Section 2 of the Constitution of Oklahoma (free exercise of religion).

Appeal from the District Court of Oklahoma County.
The Honorable W. A. CARLILE,
Judge.

Affirmed

Action to enjoin payment of salaries of teachers, professors, and other employees of the Oklahoma Agricultural colleges, and cross-action for mandamus or mandatory injunction to require such payment.

Mac Q. Williamson, Attorney General; Fred Hansen, First Assistant Attorney General of Oklahoma City, Okla., for Plaintiffs in Error.

Don Emery, Robert J. Emery, Emery & Emery, of Oklahoma City, Oklahoma, for Intervenors, Plaintiffs in Error.

Paul W. Updegraff, of Norman, Oklahoma, for Defendant in Error.

John G. Hervey, Ralph J. May, Hervey & May, of Oklahoma City, Oklahoma, Amicus Curiae.

* * * * * * *

ARNOLD, *C. J.:*

This action was begun in the District Court on May 9, 1951, by a taxpaying citizen to enjoin the Board of Regents

of the Agricultural Colleges, the State Treasurer, and the State Auditor from paying public funds to teachers in the Agricultural and Mechanical College at Stillwater who had not subscribed to and filed the loyalty oath prescribed by Enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.), 37.1-37.8). A temporary restraining order was issued.

Before the date fixed for the hearing on the application for temporary injunction, certain teachers in the College who had contracts with the Board of Regents to teach at least to the end of the school term, June 30, 1951, with leave of court their consolidated petition in intervention and cross-petitions praying for injunctive relief requiring the payment of their accrued monthly salaries.

When the cause came on for trial evidence by stipulation was introduced and entertained. The trial court made conclusions of law and entered the following judgment:

> "It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors. Exceptions allowed to all parties."

The cross petitioners, none of whom had filed the oath required by the Act at the time of trial and entry of judgment in the latter part of May, 1951, and the Board of Regents make many contentions. It is not necessary nor expedient to set forth the various and varying contentions made by appellants. Only those propositions asserted with are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed.

Pertinent to the issues raised here the act provides:

> "Every officer and every employee of the State, county, school district, municipality, public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first

thirty (30) days of such employment, take and subscribe to the oath or affirmation required by this Act. * * * Any officer or employee of the State, County, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

"The oath or affirmation required by this Act shall be the following:

"I —— —— do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that during such time as I am .....

.....

(Here put name of office, or, if employee, insert 'An employee of' followed by the complete designation of the employing officer, office, agency, authority, commission, department, or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means."

The Act further provides:

> "No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act."

The Act provided for severability as to the various provisions thereof and severability as to parts of the oath.

Before going further into a specific discussion of alleged invalidity for certain stated reasons the apparent confusion as to the interpretation to be given the parts of the oath required should be dispelled. The phrase of the oath which refers to affiliation "with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General under Governmental directive. Such list or lists are in effect made a part of the oath by reference. It must be assumed they are readily obtainable. Nothing appears to the contrary. There was no attempt on the part of the Legislature to confer authority, judicial or otherwise, upon the Attorney General in the preparation of said list or lists. It also must be assumed that the Legislature determined for itself that all those groups so listed by the Attorney General, whether foreign or domestic, were subversive organizations or communist fronts. To illustrate: One taking the oath swears that he is not affiliated "with any foreign political agency" listed by the Attorney General as being a communist front or subversive organization. This part of the oath does not contemplate non-membership in any organization, foreign or domestic, which does not appear on the list or lists of the Attorney General in existence at the time of the passage of the Act. There is no requirement in the act that an oath be taken of non-membership in

organizations not on the list of the Attorney General of the United States at the time of the passage of this act.

That part of the oath "that I will take up arms in defense of the United States in time of War or National Emergency, if necessary" means that the affiant will take up arms in time of War or National Emergency if by law required.

The part of the oath that says "that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * * refers to the same organizations listed by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the act and up to the time of the taking of the oath. The oath under this phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five-year period previous to the taking of the oath.

The statement in the oath: "That I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic" means that the affiant, be he citizen or resident alien, will support and defend the laws of this land and the form of government which is thereby established against all enemies, that is, subversive elements, whether foreign or domestic.

That part of the oath "That I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma" is objected to only by a friendly alien. He asserts sincere fear that the oath in the respects hereinafter mentioned would in effect require him to forswear allegiance to his native country.

> "Allegiance is of three kinds: (1) *natural or implied*, when it arises by operation of law, as in the case of natural-born subjects; (2) *acquired*, when it is owed by a person as a result of his receiving the rights of citizenship, as by naturalization or denization; (3) *local*, when it arises merely from the fact of residing in and receiving the protection of a country, as in the case of a resident alien."
>
> ——Webster's International Dictionary.

Obviously, a resident alien taking the oath would be pledging allegiance of the local type; there is nothing in the oath which requires him to forswear his allegiance to his native country or the country of which he may be a citizen, nor is there anything in the oath which would conflict with any allegiance owed by him to the country of which he is a national. Any resident alien is bound to obey our laws as a condition of his residing here and receiving the protection of our laws, which he is entitled to if lawfully in the United States. If an employee of the State, it is just as necessary that he be loyal to our government, its laws and institutions while here and enjoying the full protection of our laws and sharing the benefits that our institutions and form of government afford as it is that our citizens under like circumstances be loyal. He is also under the misapprehension that the requirement of the oath that "I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary" constitutes an assertion or oath by him that he would take up arms against the government of which he is a citizen. This part of the oath does not include or refer to a resident alien's country of which he is a citizen. This conclusion is inescapable in recognition of the reasonableness and fairness of the Legislature. This interpretation will no doubt dispel any fears in the mind of such friendly alien. The Legislature did not intend to require as a condition precedent to employment by the State that one take an oath that in case of war he would bear arms against his native land.

The real design and purpose of the Legislature in the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State. Incidentally and in order to effectuate its real purpose the Legislature also intended by the Act to force officers or employees of the State who are to have been within a fixed time members of the Communist Party or other subversive organizations out of governmental positions. It is now commonly known that the Communist Party and its members advocate the overthrow of government by force and violence. Such teaching and advocacy is contrary to

our Democratic form of government and detrimental to the welfare of the people. The same thing may be said of any other subversive organization. Inasmuch as the authority of the Legislature extends to all rightful subjects of legislation it is not only the duty of the Legislature but it has the power to protect the general welfare of the people of the State by the exercise of the police power against subversive influences. The act in question constitutes an exercise of the police power by the Legislature. Such acts are valid so long as they are not unreasonable, arbitrary, and capricious and do not violate any of the fundamental constitutional guaranties of the State and Federal Constitutions. We recently said in the case of Palmer Oil Corp. v. Phillips Petroleum Co., et al., — Okla. —, 231 P. 2d 997:

> "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be arbitrary, capricious, and unreasonable, and hence, irreconcilable with the conception of due process of law. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are ordinarily matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

The Act does not impair obligation of contract contrary to Article II Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.

> "All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does

not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public. In such cases, "the presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public withdraw such subjects from the police power of the Legislature'. Chicago, B. & O. R. *v.* Nebraska, 170 U. S. 72, 42 L. Ed. 948, 18 Sup. Ct. 513."

Board of Education of the City of Leavenworth v. *Phillips*, 67 Kan. 549, 73 P. 97.

To hold otherwise would be to subject the exercise of the police power inherently vested in a sovereign people to the will of contracting individuals. See *Boston Beer Co.* v. *Mass.*, 97 U. S. 33, 24 L. Ed. 989.

The statute and the required loyalty oath do not deprive public officials and employees of property or liberty without due process of law. The intervenors are employees of the state as teachers in a public institution. They have no right to so serve the state except upon such terms as the state prescribes. The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. *People* v. *Crane*, 214 N.Y. 154, 108 N. E. 427, L. R. A. 1916D 550; *Heim* v. *McCall*, 239 U. S. 175, 60 L. Ed. 207, 36 Sup. Ct. 78; *Ellis* v. *U. S.*, 206 U. S. 246, 51 L. Ed. 1047, 27 Sup. Ct. 600; *McAuliffe* v. *Mayor, etc. City of New Bedford*, 155 Mass. 216, 29 N. E. 517.

Like the success of a business, the preservation of peace, the public welfare and the integrity of law and order, in fact, our form of government, are dependent upon loyalty of public officials and employees of government. This is well known and fully recognized by all well intentioned people. Public officials assume office and employees of the state enter upon their duties with full knowledge, and in these times expectation, that the state will, if it has not already done so, make full investigation on the point and if

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thought expedient require an oath disclosing the attitude of public officials and employees. Loyalty should be and by House Bill No. 8, 23rd Legislature, is a prescribed qualification of public officials and employees of the State. Intervenors are such employees.

It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty is "that I will take up arms in defense of the United States in time of War, or National Emergency, if necessary" (that is, if by valid law required.) The provisions of the Constitution against the enactment of any law prohibiting the free exercise of religion "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell et al.* v. *State of Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213. Though some sort of exemption has always been provided for conscientious objectors in the matter of bearing arms in time of war, such persons could be legally required to bear arms. Under such a legal requirement a citizen of the United States, though a conscientious objector, would be disloyal if he absolutely refused to obey such law. Loyalty in upholding the Constitutions and laws, State and Federal, may be made a qualifying prerequisite to employment by the State. Religious practice, though in conformity with religious belief, may be interfered with where such practices are in violation of law. A conscientious objector taking the oath required can still entertain such religious beliefs as his conscience dictates and act freely in the exercise thereof so long as he does not violate or refuse to obey laws. The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For interesting reading on the subject see *Wooley* v. *Watkins*, 2 Idaho 590, 22 Pac. 102.

Is this act a bill of attainder or ex post facto law? A bill of attainder is a legislative act which inflicts punish-

ment without judicial trial. It is contended that the act is a bill of attainder because it punishes one for refusal to take an oath that he has not been a member of listed organizations by vacating his position and denying him compensation. We think the Supreme Court of the United States has answered the question in *Garner* v. *City of Los Angeles*, 98 A. C. A. 694, 71 Sup. Ct. 909, decided June 4, 1951. In that case civil service employees of the City of Los Angeles were discharged because they would not subscribe to an oath similar to that provided by the Oklahoma Act. In upholding the ordinance requiring the taking of such an oath and holding that the ordinance was not a bill of attainder the United States Supreme Court said:

> "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

An ex post facto law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an ex post facto law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an ex post facto law.

The Legislature had the power and authority to prescribe qualifications for teachers in our public institutions, and the duty to do so, and if it deemed necessary require a loyalty oath as a qualifying and necessary precedent to compensation for services rendered by employees of the state.

The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act.

The judgment denying injunctive relief to intervenors on their cross petitions is affirmed.

Halley, V.C. J., Welch, Corn, Gibson, Johnson, O'Neal, and Bingaman, JJ: concur.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35,160

THE BOARD OF REGENTS, et al., *Plaintiffs in Error,*

vs.

PAUL W. UPDEGRAF, *Defendant in Error.*

Order

It is hereby ordered that the name of defendant in error in the caption of the above styled cause be corrected to read "Paul W. Updegraff,"

Done by order of Court this 24th day of October, 1951.

BEN ARNOLD,
Chief Justice.

Filed in Supreme Court of Oklahoma, Oct. 24, 1951, Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,160

THE BOARD OF REGENTS, et al., *Plaintiffs in Error*

vs.

PAUL W. UPDEGRAFF, *Defendant in Error.*

Order

It is hereby ordered that the vote shown on the opinion filed on October 8, 1951, be deleted.

Done by order of Court this 15th day of November, 1951.

BEN ARNOLD,
Chief Justice.

Filed in Supreme Court of Oklahoma, Nov. 16, 1951, Andy Payne, Clerk.

Statement of Paul W. Updegraff Opposing Jurisdiction and Motion to Affirm

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 590

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, ET AL.,

Appellants,

vs.

PAUL W. UPDEGRAFF, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OF PAUL W. UPDEGRAFF OPPOSING JURISDICTION AND MOTION TO AFFIRM

PAUL W. UPDEGRAFF,
Counsel for Appellee.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35,160

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA,

Plaintiffs in Error,

also

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, LUELLA NIETZ AND ABOULGHASSEM ZIRAKZADEH,

Intervenors,

vs.

PAUL W. UPDEGRAFF,

Defendant in Error

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO AFFIRM.

The appellee in the above entitled cause, Paul W. Updegraff, for his statement as to the jurisdiction herein, and in support of appellee's motion to affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The question sought to be presented in this appeal is appellants' claim that Enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. A. 1941 (Supp.), 37.1—37.8),

violates the constitutional rights of each of the appellants, and impairs the obligation of the said contract and franchise in violation of Article I, Section 10 of the Fourteenth Amendment to the Constitution of the United States. These claims the appellee denies; and the State Supreme Court, in the opinion and judgment here challenged, determined the question so raised by appellants adversely to them.

The Court found that:

> "A loyalty oath required by an act of the Legislature fixing loyalty as a qualification for public officials and employees of the state may be required as a necessary precedent to the right to continue in the service of the state and draw compensation therefor so long as the terms thereof are reasonably referable and cognate to the purposes of the act and do not violate constitutional guaranties."

And the Court further held:

> "The foregoing act is not a bill of attainder of ex post facto law; nor does the oath required therein violate Article I, Section 10, Constitution of the United States or Article II, Section 15, Constitution of Oklahoma (inhibition against impairment of contract); the Fourteenth Amendment to the Constitution of the United States or Article II, Section 7 of the Constitution of Oklahoma (due process clause); the First Amendment to the Constitution of the United States or Article I, Section 2 of the Constitution of Oklahoma (free exercise of religion)."

The Court further said;

> "The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.
>
> " 'All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government

(schools in this case), do so knowing it cannot contract * * * the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public. In such cases "the presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature." Chicago, B. & O. R. *v.* (City of Omaha) Nebraska, 170 U. S. (57) 72, 18 S. Ct. 513, 42 L. Ed. 948.' Board of Education of the City of Leavenworth *v.* Phillips, 67 Kan. 549, 73 P. 97, 98.

"To hold otherwise would be to subject the exercise of the police power inherently vested in a sovereign people to the will of contracting individuals. See Boston Beer Co. *v.* Mass., 97 U. S. 25, 33, 24 L. Ed. 989."

The Court further says:

"The real design and purpose of the Legislature in the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State. * * *" (Italics supplied).

The non-Communist Statement here involved is a condi-on of employment; there is no issue as to freedom of re-gion, thought, or speech.

The case of *Garner* v. *The Board of Public Works of the ity of Los Angeles,* 341 U. S. 716, decided June 4, 1951, is ne very similar to the instant case. There the City of Los ngeles provided by ordinance, in part, as follows:

"* * * no person shall hold or retain or be eligible for any public office or employment in the service of the

City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught; or who may, after this section becomes effective (April 28, 1941) advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

"In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof." Cal. Stat. 1941, c. 67 p. 3409, Section 432.

At page 720 of the Garner case the Court said:

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

Again, at page 722, the Court said:

"* * * We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

Appellants assert that the words *"that I will take up arms in the defense of the United States in Time of War,*

or National Emergency, if necessary" is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. What did the Legislature have in mind when these words were written? Can the words mean other than bear arms if and when called upon to do so by the President as Commander-in-Chief, or agency of the Government vested with the power to call upon them to go into military service? This power is vested in the President by Congress by virtue of Title 50 U. S. C. A. 310.

Now let us apply this section of the oath to a native-born citizen with religious beliefs against war. What do the words in their application to this mean?

For example: An associate chemistry professor, genius, age 22, belongs to a religious faith opposed to war. War is declared against Russia and he is drafted. When he fills out his draft questionnaire he tells of his faith and, when drafted, is then assigned by the military authorities to non-combatant duty, or where the military authorities wish to place him.

Under those circumstances, could the chemistry professor sign that part of the oath as written: "*That I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary.*"?

Certainly, because in the final analysis Congress determines the ages and the classes called into military service and "*if it is necessary for a person to bear arms.*"

All branches of our armed forces provide special duties for persons holding religious scruples against bearing arms. As a matter of fact *any* person signing the oath "*to bear arms; if necessary*" is not affirming to do anything he will not have to do in any case if war comes. No rights are lost nor none gained insofar as bearing arms is concerned. 50 U. S. C. A. 310.

Before the Court is the question whether the State may

determine the fitness and suitability of employees for public service.

This law is to be applied only to future employment. The Legislature determined that any person belonging to the Communist party in the last five years could not be a future employee of the State. The effective date of the Act for employees already in the employ of the State was thirty days after the effective date of the Act, or May 9. On that date any person then in the State's employ and not taking the oath could not be employed by the State *in the future*. All salaries due State employees on May 9 for services rendered to that date were paid to the intervenors. The intervenors all failed or refused to execute and file the oath required by law and were discharged. It is true that any person who is a member of the Communist party or other organization declared by the Attorney General or other authorized agency of the United States to be a communist front or subversive organization could not subscribe to the oath required under penalty of perjury. Thus, failing to subscribe to the oath, they were no longer privileged to work for the State. The Legislature determined such persons were not trustworthy for *future employment*. The affidavit requirement is valid.

We further submit that the question presented in this appeal has been so definitely determined that no substantial question is presented by this appeal entitling the appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore appellee respectfully moves that the judgment and decree of the Supreme Court of the State of Oklahoma be affirmed.

PAUL W. UPDEGRAFF,
Attorney for Appellee, Paul W. Updegraff.